

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

4-7-
77-6020

To be argued by
GARY G. COOPER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6020

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant

—against—

MANHOOD FOUNDATION, INC., ROBERT ROBINSON, SOCIETY OF ST. VINCENT de PAUL, JOSEPH M. FITZPATRICK, VIRGINIA RUSSELL, H.F.J. CONSTRUCTION COMPANY, HAROLD M. STEWART, ELLIOT RICHARDSON, Personally and in his capacity as Attorney-General of the United States, MAURICE H. SIGLER, Personally and in his capacity as Chairman of the United States Board of Parole, GERALD E. MURCH, WILLIAM T. WOODWARD, JR., GEORGE J. REED, WILLIAM E. AMOS, PAULA A. TENNANT, CURTIS C. CRAWFORD, Personally and in their capacities as members of the United States Board of Parole, NORMAN A. CARLSON, Personally, and in his capacity as the Director of the United States Bureau of Prisons, RALPH L. AARON, Personally and in his capacity as the Warden of the Federal Correctional Institution at Sandstone, Minnesota,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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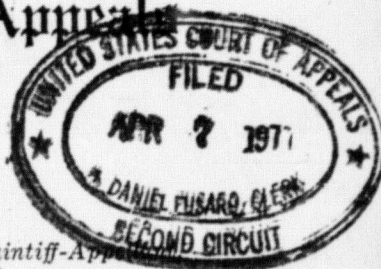


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6020

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

—against—

MANHOOD FOUNDATION, INC., ROBERT ROBINSON, SOCIETY OF ST. VINCENT de PAUL, JOSEPH M. FITZPATRICK, VIRGINIA RUSSELL, H.F.J. CONSTRUCTION COMPANY, HAROLD M. STEWART, ELLIOT RICHARDSON, Personally and in his capacity as Attorney-General of the United States, MAURICE H. SIGLER, Personally and in his capacity as Chairman of the United States Board of Parole, GERALD E. MURCH, WILLIAM T. WOODWARD, JR., GEORGE J. REED, WILLIAM E. AMOS, PAULA A. TENNANT, CURTIS C. CRAWFORD, Personally and in their capacities as members of the United States Board of Parole, NORMAN A. CARLSON, Personally, and in his capacity as the Director of the United States Bureau of Prisons, RALPH L. AARON, Personally and in his capacity as the Warden of the Federal Correctional Institution at Sandstone, Minnesota.

Defendants-Appellees.

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal by Robert W. Altimus (the "plaintiff") from a December 21, 1976, decision of the United States District Court for the Southern District of New York, Morris E. Lasker, *J.*, dismissing the complaint against all defendants and denying plaintiff's motions for reargument and for a partial summary judgment.

Issues Presented for Review

a) Whether the Parole Board's failure to provide reasons for denial of plaintiff's application for parole release was a violation of due process in 1972?

b) Whether the doctrine of "executive immunity" is a bar to plaintiff's claims against the federal defendants?

c) Whether the Administrative Procedure Act serves as a basis for plaintiff's claims against the federal defendants?

Statement of Facts

While the defendants do not dispute the statement of facts contained in plaintiff's brief, the statement contains apparent characterization of facts and subjective recitations which are not a part of the record below and do not represent an accurate objective presentation of the salient facts in this action. The facts as set forth in plaintiff's 9(g) statements accompanying his motions for summary judgment, and the complaint, in summary, are as follows:

In the spring of 1972, plaintiff, Robert Altimus, while incarcerated in a federal correctional facility in Sandstone, Minnesota, applied for parole release. Following notice given to plaintiff on August 10, 1972, plaintiff appeared before Arnold Vodvarka, a delegate of the United States Board of Parole. Other than the notice, the opportunity to appear and to submit evidence on his own behalf, plaintiff was not afforded elements of due process to which he claims he was entitled.

His parole was denied on September 18, 1972 with the recommendation that he be continued to expiration of his sentence. He was subsequently released to a half-way house but then returned to Sandstone until his mandatory release on November 19, 1973.

Plaintiff was not provided with the reasons for his denial of parole and no formal statement of such reasons appears in the file.

Proceedings Below

Plaintiff commenced this action on February 7, 1973 while incarcerated at the Federal Correctional Institution, Sandstone, Minnesota. On or about September 17, 1973 counsel was appointed by the district court and an amended complaint was filed on behalf of plaintiff on September 26, 1973.

The amended complaint named seven private individuals or entities (the "private defendants"), the chairman and members of the United States Board of Parole, the Attorney General of the United States, and the Director of the Bureau of Prisons (the "federal defendants"). The amended complaint sought redress of alleged violations of due process in the denial of parole to plaintiff while he was a prisoner.

The amended complaint alleged that the federal defendants denied plaintiff due process in not furnishing him with reasons for denial of his parole, in not giving him adequate notice of his hearing, in denying him counsel and the right to inspect his file, the right to confront and cross-examine witnesses and the right to appeal. Plaintiff alleged that the private defendants, each of whom had participated to some extent in the preparation of his parole plan, negligently failed to satisfy their respective responsibilities.

Plaintiff sought as relief:

1. A declaratory judgment that he was entitled to and had not been afforded due process;
2. An injunction against the federal defendants' continuing to deny such process;
3. An immediate release from custody; and
4. Damages against all defendants, compensatory and punitive.*

On or about October 17, 1973 several of the private defendants moved to dismiss the complaint. On January 25, 1974 the District Court entered an order denying private defendants' motion. On or about April 12, 1974, plaintiff, who was no longer in custody, moved for partial summary judgment against the federal defendants seeking declaratory relief with respect to the violation of his due process rights and injunctive relief which would afford him access to his file with the United States Board of Parole.

The federal defendants opposed this motion on the grounds of mootness by reason of plaintiff's release on probation and the state of the law at that time, May 1974, which did not require due process in the denial of parole. The motion for partial summary judgment was denied by the District Court in a memorandum decision, dated October 7, 1974, Morris E. Lasker, *J.* (A. 20-27).**

*Plaintiff sought declaratory relief pursuant to 28 U.S.C. §§ 2201-2202; mandamus pursuant to 28 U.S.C. § 1361; and compensatory and punitive damages under the Administrative Procedure Act, 5 U.S.C. § 702 (the "APA"), 28 U.S.C. § 1343 and the First, Fourth, and Eighth Amendments to the United States Constitution; and injunctive relief.

** "A" refers to Appendix filed with plaintiff's brief in this appeal.

In his decision, Judge Lasker found that plaintiff's claims with respect to injunctive relief were moot, but left open the question of damages. (A. 20-A 27).

On November 1, 1974 plaintiff moved for reargument. On April 1, 1975 after the Court invited counsel to argue the relevance of several cases involving official immunity, the defendants moved to dismiss plaintiff's remaining claims.

On April 29, 1976 plaintiff renewed his motion to reargue and moved for partial summary judgment on the damage claims. On December 21, 1976, the District Court, in a memorandum decision, granted defendants' motions to dismiss the remaining claims and denied plaintiff's motions to reargue and for partial summary judgment. This appeal followed.

ARGUMENT

POINT I

Procedural Due Process Was Not Required During The Operative Period For Parole Application Process.

As plaintiff points out in his brief, on September 3, 1976, the Board of Parole promulgated a regulatory scheme which provides for most, if not all, of the procedural safeguards at a parole application to which plaintiff claimed to be entitled in 1972, 41 Fed. Reg. 37,316-37,331 (September 3, 1976). Though plaintiff proffers several arguments in support of his damage claim, this appeal concerns the narrow issue of whether the procedural, safeguards set forth graphically at pages 16-18 of plaintiff's brief, were mandated in parole application proceedings occurring in 1972.

Plaintiff relies heavily upon the Supreme Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), concerning parole revocation, to support his argument that the federal defendants should have anticipated a change in the law with regard to the procedure to be accorded to parole applicants. The *Morrissey* decision pre-dated denial of plaintiff's parole by two months. The key ingredient to the application of *Morrissey v. Brewer*, *supra* is the Court's cautioning language with respect to the concept of due process.

... to say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. It's flexibility is in its scope *once it has been determined that some process is due*. . . . 408 U.S. 471, 481 (emphasis added).

While many of the due process requirements set forth in *Morrissey* for parole revocation were eventually applied in the context of a parole application proceeding, this Circuit's pronouncements in *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), clearly governed the due process requirements for parole application procedures during the period of plaintiff's application. A brief analysis of *Morrissey* and *Menechino* will serve to demonstrate.

In *Morrissey v. Brewer*, *supra*, the Supreme Court did not discuss parole applications.* The case was limited to the procedural safeguards necessary for a fair parole revocation proceeding. In contrast, *Menechino v. Oswald*, *supra*, embodies this Circuit's reasoning, during the

* The Court did specifically note the distinction between parole application proceedings and parole revocation proceedings. 408 U.S.C. 41, 482 n.8, *infra*, p. 10.

operative period, on the procedural safeguards required in a parole application proceeding. Indeed, the two decisions are predicated upon this factual distinction.

The first step in a due process case, as noted in the *Morrissey* case, *supra*, is to determine whether due process in any form attaches. The Court in *Morrissey*, set out the test:

We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, "This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'" *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the govern-

ment function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). 408 U.S. 471, 481.

The Court then went on to determine that there was indeed a private interest in continuation of parole "within the contemplation of the 'liberty or property' language."

We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal. 408 U.S., *supra*, at 482.

It was this determination that triggered the result in *Morrissey* and it is this determination which distinguishes *Morrissey* from *Menechino*. In parole revocation liberty, presently enjoyed is terminated, resulting in a loss thereof; in parole application, liberty presently surrendered is sought by the applicant.

The difference is not semantic; it requires very different kinds of hearings and determinations in the two processes. The Court in *Morrissey* analyzed the process of revocation as requiring two steps; the first encompasses a wholly factual determination, with respect to whether specific parole conditions have been violated. *Morrissey v. Brewer*, 408 U.S., *supra*, at 479-80. This consideration has no analogue in parole applications. The primary

questions before the board in parole applications is whether the prisoner can be released with reasonable probability that he will not violate the law, and whether his release is compatible with the welfare of society; these are discretionary, not factual, determinations.

The second step of parole revocation proceedings, as described by the court in *Morrissey*, is taken only if the initial factual determination is resolved against the parolee; that is the determination of whether or not the violation of parole conditions requires revocation. *Morrissey v. Brewer*, 400 U.S., *supra*, at 483. The emphasis upon fact-finding is not present in the parole application process where, apart from the question of whether or not prison regulations have been complied with, the major issues are matters of evaluation of attitudes and prediction of behavior.

This same concern with fact-finding is reflected in the Court's grant of relief in *Morrissey*. After the decision that due process did attach, the Court determined what process was due. The Court held first that notice must be given of the charges against the parolee. There are no charges or accusations in a parole application. They went on to require confrontation and cross-examination of adverse witnesses and other accouterments of an adversary process, (*Morrissey v. Brewer*, 408 U.S. 471, 489); none of these procedures are particularly appropriate in a parole application context.

In support of the conclusion that the reasoning of *Morrissey* does not extend by analogy to *Menechino*, the *Morrissey* court specifically noted the distinction between the two factual situations in a footnote citing this Circuit's

opinion in the *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971). 408 U.S., *supra*, at 482, n. 8.

Just as the Supreme Court in *Morrissey* noted the distinction between application and revocation, this Circuit not only noted the difference, but decided differently the two cases with the two distinct factual situations. In *Menechino* this Court held that due process did not attach to application proceedings, while in *United States ex rel. Bey v. Connecticut Board of Parole, supra*, it decided that due process did attach to parole revocation proceedings. This Circuit even went beyond the Supreme Court's *Morrissey* pronouncements in deciding that the parolee was entitled to representation. Hence, this Court clearly saw no inconsistency between denying due process to application and attaching it to revocation.

POINT II

The Federal Defendants Were Not Required To Anticipate The Development Of The Law.

It is beyond peradventure that under the present state of the law plaintiff would be entitled to various due process protections during the course of a parole application proceeding, including the right to be informed of the reasons for denial of parole. *United States ex rel. Johnshon v. Chairman, N.Y. State Board of Parole*, 500 F.2d 925 (2d Cir. 1974), *vacated as moot*, 419 U.S. 1015 (1974); *Haymes v. Regan*, 525 F.2d 540 (2d Cir. 1975). Nevertheless, the issue confronting this Court is whether the federal defendants in 1971 were required to anticipate this development of the law at their peril.

In addition plaintiff urges applicability of the APA, despite the fact that the weight of authority appears to support a contrary result (*see discussion, supra*). Whatever the merit of plaintiff's arguments with respect to the APA, it is apparent that they must stand or fall on the law which emerged after 1974.* Hence, as the District Court recognized, the quagmire in which the issue of the APA's application to the Parole Board presently finds itself can be avoided simply by addressing the threshold issue of whether the federal defendants were required to anticipate the development of the law.

a) The federal defendants were not required to anticipate the changes in Constitutional Law

In September of 1972, when plaintiff's application for parole was denied, the Board of Parole was not Constitutionally required to give plaintiff the reasons for his parole denial. *Menechino v. Oswald, supra*; *Morrissey v. Brewer, supra*. The later change in the standard of due process required in connection with the parole release decision, effected by *United States ex rel. Johnson, supra*, cannot impose liability on the defendants for action they took prior to the change. *Economou v. United States Dept. of Agriculture et al.*, 535 F.2d 688 (2d Cir. 1976). In *Economou*, this Court held that executive agency officials could avail themselves of the "good faith, reasonable grounds" defense of the type approved by the Supreme Court in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975). Here, the defendants assert their good faith reliance on the state of the law at the time of plaintiff's application for parole;

* See Judge Lasker's discussion, pp. A7-A8, concerning the fact that no Court had found that the APA applied to the Parole Board before 1974.

a time prior to the requirement of due process either by regulation or judicial authority. It is not required that government officials anticipate changes in Constitutional law. *McKinney v. DeBord*, 324 F. Supp. 928, 930-931 (E.D. Cal. 1970), citing *Pierson v. Ray*, 386 U.S. 547, 557 (1967). As the Court noted below, "when a new constitutional rule under which a defendant is sued abruptly departs from the rule in effect at the time of the alleged deprivation of constitutional rights, the plaintiff, as a matter of law, can have no claims for damages." See *Baxter v. Birkins*, 311 F. Supp. 222, 225 (D. Colo. 1970); *McKinney v. DeBord*, *supra*, 324 F. Supp. 928. As argued above, the crucial issue of the individual "loss" of liberty which mandated the *Morrissey* result does not exist in parole application. Similarly, the two proceedings have substantially different purposes. Consequently there was no compelling reason for the Parole Board to conclude that the *Morrissey* decision would be extended to include parole application proceedings. Moreover, there was no requirement for them to make such an evaluation.

The Board of Parole on its own, did determine that major changes were required in the parole application procedure. These changes are embodied in the new set of regulations, 41 Fed. Reg. 37,316-37,331 (September 3, 1976), which, to some extent, were first applied in the north-east region.* Plaintiff would have this Court find that the Board's efforts at reform, prior to judicial mandate, evidenced bad faith in its treatment of plaintiff, and establishes the Board's cognizance of the eventual change in the law. Such a conclusion finds no support in the record before the district court and is nothing more than

* The Board experimented with at least one aspect of these regulations by providing prisoners with the reasons for their parole denial at five selective institutions in the north-east region.

a strained effort by plaintiff to support an otherwise futile claim. The court below recognized this and succinctly disposed of the argument at p. 9 of its December 21, 1976 decision:

"Additional confirmation that the giving of reasons was in an experimental and limited stage at that time is found in *Battle v. Norton*, 365 F. Supp. 925, 926 (D. Conn. 1973). There, Judge Newman found that the Board began an experimental program of supplying reasons for parole denial in December, 1972 at the Board's North-east Region institutions; because the program was experimental, Judge Newman refused to hold that the Board's failure to give *all* reasons for its decision (in September of 1973) violated any rights of the would be parolee. The Board was and is free to experiment with improvements in its decisionmaking without those experiments affording a basis for liability where the 'experiment' is later held to have been required by due process and an inmate not included in the experimental group claims his rights were violated and seeks damages."

There is nothing in the record before this Court which would dictate a result any different than that in the *Norton* case. Indeed, plaintiff does not even address this finding by the Court below in his arguments on this point.

b) In 1972, no circuit had yet held that Section 555(e) applies to parole denials

Just as in 1972 the Constitution had not been read so as to require a statement of reasons for denial of parole, no court had held that section 555(e) of the APA applied to parole denials. Section 555(e) was held applicable to parole denials for the first time in 1974 by the Seventh

Circuit in *King v. United States*, 492 F.2d 1337, 1345 (7th Cir. 1974). *King* was followed in *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); the decision in *Mower*, however, was not applied retroactively, since there was no indication of bad faith in the administration of the applicable law. *Id.* at 399.

Although the District of Columbia Circuit has held that there is a Constitutional right to the reasons for parole denial, they have explicitly declined to apply section 555(e) to parole denials. *Childs v. United States Board of Parole*, 511 F.2d 1270, 1279 (D.C. Cir. 1974). Thus, under the authority of *Economou*, no Federal defendant can be held to answer for failing to anticipate the eventual application by two Circuits of section 555(e) of the APA to the denial of parole.

POINT III

The APA Does Not Serve As A Basis For This Action For Damages Against Federal Officials.

Plaintiff relies on the APA to support his claim for damages against the federal defendants in their official capacity. This reliance is clearly misplaced. The authority to release an inmate on parole is committed to the discretion of the Board of Parole. 18 U.S.C. 4203. The APA is not applicable to agency action which is committed to the discretion of an agency by law. 5 U.S.C. 701(a)(2). Moreover, the APA does not apply to the individual federal defendants who are alleged to have been negligent.

Apart from the inherent prohibitions against applications of the APA to the case at bar the fundamental concept of "sovereign immunity" is a bar to a damage claim

against the United States based upon the APA. *United States v. Testan*, 424 U.S. 392 (1976). *Testan* involved a suit against the United States, in the Court of Claims, for money damages arising out of an alleged violation of a federal statute. The Court rejected the argument that "all substantive rights as of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." *Testan*, *supra*, at 401. Indeed, a violation does not give rise to an action for damages unless the basis of the federal claim, the statute allegedly violated, "in itself can fairly be interpreted as mandating compensation by the federal government for the damage sustained." *Testan*, *supra* at 402.

Plaintiff invokes the Administrative Procedure Act, claiming that some right conferred under this broad legislative enactment has been violated. Since only section 555(e) of that Act is even arguably relevant and since the section of Professor Davis' Treatise cited by plaintiff refers to that section, we must look to the terms of that section to determine if it "mandates compensation":

"Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." (APA, Section 555(e)).

Concededly, section 555(e) could be read as giving the plaintiff a right to be informed of the basis for the denial of his petition for parole; however, the Section cannot be construed so as to give rise to a damage claim for its violation. Thus, since the United States "is immune from suit save as it consents to be sued," *United States v.*

Sherwood, 312 U.S. 584, 586 (1941), and since Section 555(e) will not serve as a judicial basis for damages, the plaintiff cannot rely upon this section. *Califano v. Sanders*, 45 U.S.L.W. 4209 (February 23, 1977).

CONCLUSION

The December 21, 1976, decision of the District Court granting defendants' motions to dismiss and denying plaintiff's motions to reargue and for partial summary judgment should be affirmed.

Dated: New York, New York
April 7, 1977.

Respectfully submitted,

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*United States Attorney for the
Southern District of New York,
Attorney for the Federal Defendants.*

GARY G. COOPER,
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

against

MANHOOD FOUNDATION, INC., et al

Defendants-Appellees

CA 77-6020

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 8th day of April 1977, she served two copies of the Brief for Federal Defendants-Appellees by placing them in a properly postpaid franked envelope addressed:

Garey and Garey
342 Madison Avenue
~~New York, New York~~ 10017

Pierce Paley, P. C.
711 Third Avenue
New York, New York 10017

And deponent further says she sealed the said envelopes and placed the said envelopes in the mail drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

8th day of April 1977.

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

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CA 77-6020

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the _____
two copies
7th day of April 19 77 she served/~~xxxxxx~~ of the
within Brief for Federal Defendants-Appellees

by placing the same in a properly postpaid franked envelope addressed:

Nicholas A. Robinson
Marshall, Bratter, Greene, Allison and Tucker, Esquires
430 Park Avenue
New York, New York 10022

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

7th day of April, 19 77

Marion F. Bryant

Naeph Ler

RALPH L. LEE
 Notary Public, State of New York
 No. 41-2292838 Queens County
 Term Expires March 30, 1979